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Spain

AVIATION FINANCE & LEASING

Contributing firm

Augusta Abogados



Sergi Giménez Binder

Partner | s.gimenez@augustaabogados.com

This country-specific Q&A provides an overview of aviation finance & leasing laws and regulations applicable in Spain.

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SPAIN

AVIATION FINANCE & LEASING



1. What international aviation conventions has your jurisdiction signed and/or ratified?

The Kingdom of Spain is a state party to the following air law treaties (all of them in effect), among others:

- Warsaw Convention 1929 (as subsequently amended by the Montreal and Hague Protocols).
- Rome Convention 1933.
- Chicago Convention 1944.
- Rome Convention 1952.
- The Hague Convention 1970.
- Montreal Convention 1971.
- Montreal Convention 1999.
- Cape Town Convention 2001.

2. If your jurisdiction has signed and ratified the Cape Town Convention: a. Which qualifying declarations (opt-in and opt-out) has your jurisdiction made under the Cape Town Convention? b. Does the Cape Town Convention take priority over conflicting national law?

Spain has made declarations in respect of

- Article 39(1)(a) of the Convention: priority of non-consensual rights or interests over registered international interests
- Article 39(1)(b) of the Convention: priority of amounts owed to public bodies relating to the provision of public services
- Article 40 of the Convention: court orders permitting attachment of aircraft objects and tax liens shall be registrable under the Convention
- Article 53 of the Convention: competence of Spanish courts
- Article 54.2 of the Convention: prohibition of self-help remedies, except for IDERA
- Article XIX of the Protocol: the Movable Assets

Registry is designated as an “authorizing entry point”

- Article XXX(I) of the Protocol: applicability of IDERA instrument in Spain
- Article XXIX of the Protocol: applicability of the Convention and Protocol to Gibraltar

Yes, by virtue of the principle that international treaties take priority over domestic legal provisions.

3. Will a court uphold the choice of a foreign governing law in respect of the following contracts and if so, please also state any conditions or formality requirements to this recognition a. Lease and b. Security document (for example, mortgage)?

Yes, as a general rule, the choice of a foreign law to govern an agreement will be upheld as a valid choice of law by the Spanish courts in accordance with the provisions of Regulation (EC) 893/2008 on the law applicable to contractual obligations (“Rome I”). This Regulation produces an erga omnes effect under Spanish law, that is to say, Spanish courts will apply the law designated pursuant to the Regulation even if such law is that from a non-European Union State.

In accordance with the Rome I Regulation, Spanish law follows the principle of *lex rei sitae* (ie, place of location of an asset) to determine which law is applicable to securities and guarantees created over assets, such as mortgages and pledges. Thus, where the security relates to assets or rights located in Spain at the time of creating the assignment, Spanish material legal provisions on pledges over assets or mortgages would become applicable. Article 10.2 of the Spanish Civil Code states that mortgages over aircraft are governed by the law of the country of their registration. Thus a non-Spanish law mortgage created over an aircraft while such aircraft is registered in the Spanish registry would not be considered a valid mortgage by the Spanish courts.

4. Please confirm whether it is (i) customary and (ii) necessary to also take a local law mortgage and if so, why?

Given the formalities and costs involved in setting up a Spanish law aircraft mortgage, these are created only occasionally. Such mortgages have to be set up in a public deed executed before a notary public, which has to include certain essential information (parties, detailed description of the charged assets, title of the mortgagor, secured amount, valuation of the assets, etc). This document must be executed in Spanish, although there is no obstacle in attaching an English translation. The mortgage must be recorded at the Movable Assets Registry. Mortgages are subject to stamp duty tax, at a rate that varies between 1 and 1.5 per cent on the value of the charged asset. Further, the fees of the notary public and of the Movable Assets Registry should also be taken into account, since they also depend on the value of the charged asset. Finally, where there is an international element to the transaction, often translation costs are to be paid.

5. Are foreign judgments recognized and enforceable by courts of your jurisdiction and if so, please also state any conditions or formality requirements to this recognition (for example, do you require a local court order confirming such recognition)?

Spain regularly recognizes and enforces foreign judgements.

- As a member of the European Union, judgements in civil and commercial matters given in the courts of another EU Member State are generally enforceable in the courts of Spain without re trial or re examination of the merits of the case subject to the requirements and restrictions of the Regulation (EC) 1215/2012 of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (as amended).
- Judgements given in the courts of States with whom Spain does have a multilateral or bilateral treaty dealing with the mutual recognition and enforcement are recognized and enforced in Spain, subject to the requirements and restrictions of such treaties.
- Judgements given in the courts of States with whom Spain does not have a multilateral or bilateral treaty that would contemplate a

regime for recognition and enforcement are, in general, also recognized and enforced in Spain, subject to the requirements and restrictions of the Spanish 2000 Civil Proceedings Act and the 2015 International Legal Cooperation Act. These Spanish legal provisions and their interpretation by the Spanish Supreme Court:

- Include a negative reciprocity requirement, i.e., the Spanish Government can decide not to grant such recognition if a certain State does not recognise Spanish judgements. Such decision requires express legislation to be passed, and so far no country has been excluded.
- Allow the rejection of the recognition and enforcement of a foreign judgment if the contacts with the Court of origin to the case submitted to such Court were not sufficient. The test is normally satisfied when the foreign court of origin is the court to which the parties to a contract have voluntarily submitted.
- Allow the rejection of the recognition and enforcement of a foreign judgment contrary to forum public policy ("ordre public"). Damages granted by the Court of origin when considered excessive from the point of view of Spanish law may be grounds for non-recognition or non-enforcement.
- Allow the rejection of the recognition and enforcement of a foreign judgment contrary to the due process clause of the Spanish law. Service of process in a manner not provided for in an international Treaty when such a Treaty is of application or with insufficient time to defend the claim may be grounds for non-recognition or non-enforcement.
- Allow the rejection of the recognition and enforcement of a foreign judgment if such judgment is not contained in a solemn public document known as a writ of execution ("ejecutoria") or the subject matter of the judgement is included among of the matters over which Spanish Courts have

exclusive jurisdiction.

6. Is your aircraft registry an owner-register (registering ownership interests) or an operator-register (registering interests as operator)? Please also state any conditions, procedural steps or formality requirements for such registration and explain how this is evidenced (for example, the issuance of a Certificate of Registration)

In Spain there is a dual registration system. Its main features can be summarised as follows.

- **Aircraft Matriculation Registry:** First, there is an aircraft registry, the Aircraft Matriculation Registry (Registro de Matrícula de Aeronaves, "RMA"). The RMA falls under the jurisdiction of the Spanish State Agency for Air Safety ("AESA"), a body of the Ministry of Development. The RMA is an administrative registry of aircraft, but not a registry of title or ownership of aircraft. It is operator-based. The main effect of registration is that an aircraft is provided with a Spanish registration number (beginning with the letters EC, followed by a hyphen and a combination of three letters, e.g. EC-XXX) and thus becomes a Spanish aircraft.
- **Central Movable Assets Registry:** Second, there is the Central Movable Assets Registry (Registro de Bienes Muebles, "RBM"), under the jurisdiction of the Directorate General of Registries and Notaries, a body of the Ministry of Justice. The RBM is a register of title, ownership and encumbrances over movable assets, including aircraft. The main effect of registration is that evidence is provided in respect of the status of ownership and liens over assets. Third parties can therefore rely on the information provided by the RBM and parties who acquire an asset from the registered owner are protected even if such owner has no or defective title, unless it can be shown that the buyer was aware of such lack of title.

Royal Decree 384/2015, which contains the RMA Regulations, is being interpreted in practice so as to allow (and actually oblige) non-Spanish aircraft owners (including non-EU citizens) to register their ownership title at the RBM in all aircraft that are to bear Spanish registration marks.

The following steps should be taken by the parties to record ownership interests over aircraft in Spain:

- Obtaining the import license and complying with all customs formalities, when applicable;
- Filing the appropriate documents (essentially Form no. 600) to obtain the applicable tax exemptions (if any) in connection with the import of the Aircraft;
- Filing with the RMA of copies of the transaction documents (e.g., bill of sale, purchase and sale contract, lease agreement, certificate of acceptance, certificate of insurance, etc.), to obtain the provisional registration marks of the Aircraft - this is usually achieved simultaneously with the closing of the transaction. The provisional registration marks are valid for 90 days.
- Filing of the complete set of transaction documents with the RBM, duly legalized by a Notary Public (and apostilled where such Notary is non-Spanish) and officially translated into Spanish. The RBM then reviews the transaction documents and, if it finds them to be in order, records them.
- Upon receipt of confirmation from the RBM that it has recorded the transaction documents, these have to be submitted again to the RMA to obtain the definitive registration marks ("matriculación definitiva") for the aircraft (not later than 90 days from receiving the provisional registration number, although this period of time can be extended upon request).

7. Is there a security document register in your jurisdiction where a mortgagee's interests will be recorded? If so, please also state any conditions, procedural steps or formality requirements for such registration and explain how this is evidenced (for example, the issuance of a certificate or official stamp on the security document)

As stated, mortgages over aircraft are recorded at the RBM, who then reports such registration to the RMA. When setting up Spanish law mortgages over aircraft, the following must be taken into account:

- The mortgage over movable assets has to be set up in a public deed executed before a Notary Public, which has to include certain essential informations (parties, detailed

description of the charged assets, title of the mortgagor, secured amount, valuation of the assets, etc.). This document must be executed in Spanish, although there is no obstacle in attaching an English translation.

- The mortgage must be recorded at the Movable Assets Registry.
- Mortgages are subject to Stamp Duty Tax, at a rate that varies between 1% and 1.5% on the value of the charged asset.

8. What is the effect of registration of: a. Ownership interest (for example, proof of title to third parties of ownership) b. Lease (for example, perfects the status of the Lessor under the Lease) c. Security document (for example, secures priority over later registered security). If there are any interests that could rank prior to the security document please state these

As mentioned above, the RMA is merely an administrative registry of aircraft, but not a registry of title or ownership of aircraft. Since the RMA is not a title registry, registration at the RMA does not provide, "per se", any priority rights. However, Spanish courts would accept the information and statements of the RMA as "prima facie" evidence.

This role is reserved to the RBM, which is a register of title, ownership and encumbrances over moveable assets, including aircraft. The main effect of registration at the RBM is that evidence and priority are provided in respect of the status of ownership and liens over assets. Third parties can therefore rely on the information provided by the RBM and parties who acquire an asset from the registered owner are protected even if such owner has no or defective title, unless it can be shown that the buyer was aware of such lack of title.

9. What types of lease are recognized in your jurisdiction (for example, translation, notarization, apostille, legalization etc.)?

Spanish law recognizes the usual types of leases, such as operative leases, finance leases, wet leases, etc.

10. What formalities are required to perfect Lessor's rights under a lease in your jurisdiction?

In accordance with the principle of freedom of form,

there are essentially no formalities associated with the execution of lease agreements. However, as indicated above, lease interests over Spanish-registered aircraft have to be registered at the RBM and the RMA. The process to register lease interests is very similar to the one described for the registration of ownership interests. The main difference is that the transaction documents (lease agreement, certificate of acceptance, etc.) do not need to be executed as a notarial public deed, but only the parties' signatures have to be legalized by a notary public.

11. Are the ownership rights relating to engines recognized as separate and distinct from the ownership of the rest of the aircraft in your jurisdiction? Please highlight any separate registration, filing or additional formalities that are required to be completed to perfect Lessor's interest in the engines

The RMA and RBM are registries to reflect the status of ownership, charges, liens, leases, etc. of aircraft, but do not record transactions relating to aircraft engines. However, each Spanish province (54 in total) has its own Provincial Moveable Assets Registry. These registries are in charge of recording financial transactions and security interests over moveable assets, typically automobiles, motorbikes, industrial machinery, etc. The recordation of ownership interests is associated with formalities and costs (notarization, stamp duty, etc.), which are generally resisted against by Spanish operators. There are no legal restrictions as to who can be recorded as owner, but adequate evidence of the parties' existence must be submitted (legalized extracts of the applicable companies or commercial registries, authorities of the signatories, etc.). On some occasions, financiers of aircraft engines have requested that title and securities over engines are recorded at such Provincial Registries. This is associated with an additional layer of formalities and costs, and in the light of the entry into force of the Cape Town Convention for Spain it will become an even more unusual request.

12. What form does security over aircraft generally take in your jurisdiction?

To be opposable as against third parties, security over aircraft must be executed as a notarial public deed and recorded at the RBM.

13. Are there any particular terms or characteristics that such a security document must take (for instance, a cap on the secured liabilities)?

Under Spanish law, securities ought to secure a specific debt of a certain amount which has to be clearly stated in the deed of execution of the security (principle of determination). It is nevertheless possible to set up a charge in order to secure credit or overdraft facilities, in which the exact amount owed by the debtor will only be known at the time where the debt becomes due (e.g., elapsing of agreed period, event of default, etc.). Even the rate of interest might be a floating one. However, in order to comply with the principle of determination the deed of mortgage must state at least (i) the maximum principal amount for which the charged asset is answerable and (ii) the maximum rate of interest.

Securities must be placed on specific assets which may be clearly identified (principle of speciality). Aircraft must be identified by make, model, serial number and Spanish registration number. As a consequence of the principle of speciality floating charges are not admitted under Spanish law.

Unless otherwise agreed between the parties, the mortgage secures, in addition to the principal amount, interest of the last two years; the mortgage includes any indemnity which may correspond to the mortgagor by virtue of the charged asset.

14. Are there any perfection requirements for such security document? If so, please state any conditions, procedural steps, formality requirements or documentation (for example, corporates, list of directors etc.) required to effect this

To execute the notarial public deed of aircraft mortgage, some facts need to be proven:

- Due existence of the parties, and authorities of their respective representatives (through legalized certificates of incorporation, excerpts of the relevant companies registry, powers of attorney, etc.)
- Spanish tax identification numbers for all foreign entities involved in the transaction.
- Evidence of ownership over the mortgage aircraft.
- Registration marks and certain technical details of the mortgage aircraft.
- Self-assessment and payment of Stamp Duty

Tax.

15. Summarize any captive insurance regime in your jurisdiction as applicable to aviation.

Insurance and reinsurance activities can be carried out in Spain by Spanish entities and also by EU insurance companies, subject to the provisions of Directive 2009/138/EC (as amended) and Spanish implementing legislation (basically, the Act 20/2015).

16. Are cut-through clauses under the insurance and reinsurance documentation legally effective in your jurisdiction?

Article 78 of the Act 50/1980 on Insurance Contracts states that an insured cannot claim directly from the reinsurer any compensation or require any other duty to be performed by the reinsurer. Thus, in principle, cut-through clauses are not directly enforceable in Spain if the relevant insurance contracts are subject to Spanish law. However, Article 107 of the same Act expressly allows the submission to foreign laws for aircraft insurance. Therefore, the validity of the cut-through clause will depend on the choice of law clause in the relevant insurance contracts. Nevertheless, some legal scholars still consider that this type of clauses are not enforceable in Spain based on a literal interpretation of the said provision.

17. Are there minimum requirements for the amount of third-party liability cover that must be in place in your jurisdiction?

As a member of the EU, the general requirements of third party liability coverage foreseen under EU law apply in Spain as well (essentially, those contemplated under Regulation (EC) 785/2006, as amended).

18. Can a mortgagee (or equivalent security interest holder) or lessor following an event of default under a mortgage (or equivalent security document) or lease, respectively, take possession of the aircraft without judicial intervention in your jurisdiction? Please also state any conditions, procedural steps, formality requirements or documentation (for example, original, legalized, translated

Lease/Mortgage, corporates etc.) required to effect this

As a general rule, self-help is not allowed under Spanish law and is, in fact, considered to be against Spanish public order. Therefore, if the Spanish operator refuses to cooperate during the termination / de-registration / repossession process, a lessor / owner would have to seek Court assistance to enforce its rights. The specific procedure to be followed will depend on the type of remedy which the lessor is seeking. Only where self-help is expressly permitted by Spanish law or international treaties can such remedies be used. When ratifying the Cape Town Convention, Spain expressly declared that all remedies contemplated under the Convention would require leave of Court, with the exception of IDERA's.

19. How can a mortgagee (or equivalent security interest holder), lessor under a lease or designee/beneficiary of an IDERA deregister the aircraft? Please also state any conditions, procedural steps, formality requirements or documentation (for example, original, legalized, translated Lease/Mortgage/IDERA etc.) required to effect this

Essentially, a simple application to the RMA is to be submitted, along with (1) a copy of the IDERA, (2) an IDERA execution notice addressed to the defaulting party, and (3) proof of payment of the RMA's processing fees.

20. Can the government or the lessee lawfully prevent the repossession or deregistration and if so, in what circumstances

The Cape Town Convention contemplates a limited number of situations in which the operator or the Government may oppose repossession or deregistration. These causes apply in Spain as well.

21. If judicial intervention is required, please describe the process? Please also state any procedural steps, length of time to complete and advise as to documentation required

If a deregistration and export using an IDERA are intended, then no judicial intervention is needed

(although no practical experience in the context of insolvency proceedings exists as of today). All other remedies will require a court order.

22. How is legal title transferred under the laws of your jurisdiction? Please also state any conditions, procedural steps, formality requirements or documentation (for example, corporates etc.) required to effect this

As a general rule, for ownership over an asset to be transferred Spanish law requires the existence of a valid title ("*título*", i.e., a legal institution that entails a transfer of ownership, such as a purchase and sale agreement) and a certain activity that indicates such transfer ("*modo*", e.g. actual delivery of the asset to the buyer). In aircraft sale transactions, a bill of sale is generally accepted as a document which evidences transfer of title. The Spanish authorities recognise bills of sale as valid documents when non-Spanish registered aircraft are transferred. However, if the aircraft is registered at the RBM, any such transfer of title will have to be executed as an aircraft sale and purchase agreement before a notary public in order for it to be registered at the said Registry.

Although Spanish law is based on the principle of freedom of form, in aircraft finance transactions it is standard to use the written form. Such form is mandatory when Spanish rights "in rem" or where international interests under the Cape Town Convention are intended to be created. Additionally:

- All documents which have to be recorded at the RMA and/or the RBM will have to be translated into Spanish by an officially admitted translator. Spanish law accepts the validity of foreign language documents, but for recordation purposes and to make documents executed in a foreign language admissible evidence before Spanish courts, translations into Spanish are required.
- The signatures of the parties' representatives on the above documents will have to be legalized by a notary public. If such notarization is not made by a Spanish notary, then the foreign notarization will have to be legalized with the Apostille of the 1961 The Hague Convention (or by diplomatic means if the country in question is not a party to the said convention).
- Under certain circumstances, the transfers of title and the creation of a Spanish securities must be executed as notarial public deeds

(rather than a simple legalization of the parties' signatures), which requires some additional formalities.

- All recordable documents must be submitted to the Spanish tax authorities for stamping, even if the transaction is tax exempt.

23. Are there any restrictions on the sale of an aircraft following enforcement (for example, the requirement to obtain a court order or conduct a public auction or other action in order to sell the aircraft upon enforcement)

Where enforcement has taken place through actions in the Spanish courts, the creditor's rights will depend on what exactly was requested from the court (e.g., repossession, seizure of asset, recognition of title, etc.). In general terms, non-owners of an asset cannot sell such asset directly, but only through a court-controlled system (usually a public auction).

24. Would lease rentals be subject to tax (for example, withholding or income tax)? Please also state if there are any conditions for such tax to be imposed and any steps usually taken to mitigate this

The tax aspects of aircraft finance transactions must be analysed on a case-by-case basis, and the relevant treaties to avoid double taxation need to be reviewed (if applicable). In general terms lease payments are generally tax exempt when they relate to aircraft that are chiefly operated for international commercial flights.

25. Would a sale of an aircraft in your jurisdiction incur sales tax? Please also provide details of amount or calculation and any steps usually taken to mitigate this

As indicated, the tax aspects must be analysed on a case-by-case basis, taking into account the relevant treaties to avoid double taxation (if applicable). In general terms transfers of aircraft are generally tax exempt when they relate to aircraft that are chiefly operated for international commercial flights. However, despite being tax exempt, the parties are still obliged to submit certain tax filings with the Spanish tax authorities before such transactions can be recorded. Furthermore, particular attention should be paid when an aircraft is transferred while being in Spanish territory, because

Value Added Tax at a rate of 21% could be triggered under certain circumstances.

26. Are there any restrictions on the import or export of aircraft in your jurisdiction and would such importation or exportation incur any liability as to customs or taxes? Please also state if any consents or approvals are required and the procedural steps taken to obtain these, and any procedural steps or formality requirements to mitigate any taxes

As a EU member state, the general import and export restrictions and requirements set out in EU legislation apply in Spain. The customs requirements applicable to the import and export of aircraft depend, in general terms, on their origin. Where an aircraft is imported from or exported to a non-EU country, then a Single Administrative Document ("*Documento Único Aduanero*", "*DUA*") must be completed and filed with the customs authorities. If the transaction is made with a EU country, then a simple Intrastat filing is enough. The responsibility of filing such documents lies with the person importing or exporting the aircraft. While this is generally the airline, in some circumstances it has to be undertaken by the lessor / owner.

27. Are there any foreign exchange restrictions on transfers of funds

Subject to applicable sanctions dictated by the Spanish authorities, the European Union or the United Nations, there are no particular restrictions on international payments in Spain. Spanish exchange control provisions merely mandate that certain formal requirements are complied with by the payor when making payments abroad. Normally payments are made through financial entities. As in other EU member states, prior information and/or authorisation requirements are in place when payment is to be made in cash or similar payment instruments.

28. How successful have foreign creditors and lessors been in enforcing their security and lessor rights over and successfully repossessing aircraft in a timely manner?

Practical experience indicates that foreign creditors and lessors have not experienced particular difficulties in recovering their assets from Spanish airlines, even before the entry into force of the Cape Town Convention.

29. What government led reforms affecting creditor and lessor rights are currently underway in the aviation sector in your jurisdiction?

For the time being, no such measures are envisaged.

30. Please describe any interesting legal development in your jurisdiction (for instance, decided court cases or arbitral awards) which affect creditor and lessor rights?

In the last 12 months a couple of IDERA repossessions have taken place for the first time since Spain ratified the Cape Town Convention. These first cases have shown that the Spanish authorities are aligned with the principles and aims of the Convention, and have facilitated the remedies sought by the creditors.

31. Please discuss any relevant governmental regulations implemented in your country to help alleviate the financial and other difficulties faced by airlines in your jurisdiction caused by CoVid 19 and

whether that will impact rights of lessors (who lease aircraft to the airlines) and lenders (who finance such aircraft which are mortgaged in favour of the lenders)? Are such governmental regulations expected to be in place until the difficulties faced by airlines caused by the CoVid 19 subside or are they more long term?

To assist the Spanish carriers with their cash flow impasse, the Government has granted some state-backed loans to Iberia, Vueling, Air Europa and Air Nostrum for a total amount of more than 1,000 million Euro. It remains to be seen if this financial support will be enough to save the airlines from failure, because in addition to the operational issues and substantial loss of income, carriers all over Europe are facing massive claims for refund of the tickets paid by their customers.

The Government has also announced that in the next months it will impose a mandatory system of consumer arbitration, whereby all passenger claims will have to be settled by arbitration under the control of AESA. The system is presently being set up, and airlines have voiced their concerns about a mechanism that might take their right -and the consumer's right- of access to justice.

Contributors

Sergi Giménez Binder
Partner

s.gimenez@augustaabogados.com

